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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 343

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, et al.,
Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THE QUESTION PRESENTED

While the petition argues the merits of petitioner's claims, we submit that the only question properly presented is whether an order of a District Court staying proceedings in a suit brought under Section 301 of the Labor Management Relations Act (29 USC 185), pending arbitration pursuant to the provisions of the contract on which the suit is based, is an appealable order. The Court of Appeals held that it was not and dismissed the appeal. The Court of Appeals

held (1) that a stay of suit in equity pending arbitration is not a final judgment appealable under 28 USC 1291 and (2) that the stay in this case was not an injunction appealable under 28 USC 1292(a)(1). Its ruling was correct on both scores.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petition fails to assign any of the reasons specified in Rule 19 of the Rules of this Court which would justify the granting of the writ. It does not suggest that there is a conflict between the decision below and that of any Court of Appeals or that the decision below conflicts with any decision of this Court. Indeed a review of the decisions of this Court and of the Courts of Appeals which have considered the question of appealability of a stay order of the kind here involved demonstrates that the decision below is in perfect harmony with the already established case law.

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(1) THE STAY ORDER IS NOT A FINAL JUDGMENT UNDER 28 USC 1291.

In *Goodall-Sanford v. United Textile Workers,* 353 U.S. 550 (1957), this Court held appealable an order directing arbitration in an action wherein the sole relief sought was the specific performance of an arbitration clause in a collective bargaining contract. Of course, such an order, as contrasted with the stay here granted, was "final" because it was "not merely a

step in the judicial enforcement of the claim nor auxiliary to the main proceeding," but because it constituted "the final relief sought" (353 U.S. at 551). That, of course, is not this case. Furthermore, in *Goodall-Sanford,* this Court was careful to point out that that case was not comparable to *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955) "which held that a stay pending arbitration was not a 'final decision' within the meaning of 28 USC Section 1291" (353 U.S. at 551).

We submit that controlling on this petition is the *Baltimore Contractors* case which, affirming an order of the Court of Appeals for the Second Circuit (216 F.2d 192 [1953]) dismissing an appeal from a District Court order denying a stay pending arbitration, emphasized the long standing Congressional policy against piecemeal appeals underlying section 1291 and which quoted with approval the following language from the earlier decision in *McLish v. Roff,* 141 U.S. 661, 665 (1891):

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." (348 U.S. at 178)

The view that an order denying or granting a stay pending arbitration (as distinguished from an order to arbitrate where that is the very relief sought) is *not* final within the meaning of Section 1291 and is

therefore not appealable has been consistently followed by the Courts of Appeal. *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283,* 269 F.2d 618 (C.A. 2, 1959); *Greenstein v. National Skirt & Sportswear Association, Inc.,* 274 F.2d 430 (C.A. 2, 1960); *Lummus Company v. Commonwealth Oil Refining Co.,* 297 F.2d 80 (C.A. 2, 1961), cert. denied, *sub nom., Dawson v. Lummus Company,* 368 U.S. 986 (1962); *Kirschner v. West Company,* 300 F.2d 133, 134 (C.A. 3, 1961); *Jackson Brewing Company v. Clarke,* 303 F.2d 844 (C.A. 5, 1962), cert. denied 371 U.S. 891 (1962). Indeed, it has been specifically followed in cases arising, like this one, under Section 301 of the National Labor Relations Act. *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, supra; Greenstein v. National Skirt & Sportswear Association, Inc., supra.*

Thus the decision below is in complete harmony with the decisions of this Court and of the Courts of Appeals which have considered this question and there is no good reason why this Court should once again have to review this already settled question.

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(2) THE STAY ORDER IS NOT AN INJUNCTION APPEALABLE UNDER 28 USC 1292(a)(1).

An exception to the finality doctrine of Section 1291 provides for an appeal from interlocutory orders "granting . . . [or] . . . refusing . . . injunctions." 28 USC 1292(a)(1). However, it has long been held that while a stay of a legal proceeding may be an-

alogized to an injunction for purposes of this section, the analogy is not applicable if the stay represents, as it does here, the action of a court of equity controlling the sequence of its own proceedings.

A comprehensive review of the relevant cases is to be found in the *Baltimore Contractors* case where the Court held that the denial of a stay, pending arbitration, in an "equitable action . . . for an accounting" (348 U.S. at 176) was not the refusal of an injunction within the meaning of Section 1292(a)(1). Such a denial was, the Court said, merely "a step in controlling the litigation before the trial court." (348 U.S. at 185). Thus it was clearly distinguishable from the granting or denial of a stay pending arbitration in an action at law for damages for breach of contract (*Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 [1935]) or in an action at law for monies due under an insurance policy (*Enelow v. New York Life Insurance Company*, 293 U.S. 379 [1935]; *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 [1942]). If the suit, however, were one in equity—for reformation of the contract—the rule would be different. Cf. *Morgantown v. Royal Insurance Co.*, 337 U.S. 254 (1949). Furthermore in *Morgantown*, this Court disposed of the argument that because the order there in question (denial of a jury trial) was of "importance" to the litigation it ought to be appealable, by saying:

> "Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions." (337 U.S. at 258)

In the *Baltimore Contractors* case this Court recognized that the distinction to which it was there adhering had in it "elements of fiction in this day of one form of action" (348 U.S. at 184). However, it was of the view that the question of which orders should be appealable and which should not was a matter for Congress. It therefore concluded:

> "... that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." (348 U.S. at 185.)

That the action here is essentially equitable is apparent from the gravamen of the complaint. Petitioners seek a mandatory injunction (Ptn. for Cert., App. 51), a declaration of rights (id., 15-53), and an accounting (id., 53-54).

It is interesting to note that one of the amendments which Congress apparently found it "proper" to make after *Baltimore Contractors* was to render appealable interlocutory orders upon a certificate of the District Judge that the order "involves a controlling question of law as to which there is a substantial difference of opinion." (Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770; now 28 USC 1292[b]). Although the District Court (*King v. Grand Lodge of Machinists*, 215 F. Supp. 351 [N.D. Calif., 1963]) and the Court of Appeals (*United States v. View Crest Garden Apts., Inc.*, 265 F.2d 205 [C.A. 9, 1958]; cf. *United States v. Woodbury*, 263 F.2d 784, 787 [C.A. 9, 1959]; *International Longshoremen's and Warehousemen's*

Union v. Kuntz, ... F.2d ..... [C.A. 9, No. 18981, June 26, 1964]) have both been liberal in permitting litigants to invoke the new procedure—and have done so in suits brought under Section 301 of the National Labor Relations Act (*King v. Grand Lodge of Machinists, supra, International Longshoremen's and Warehousemen's Union v. Kuntz, supra*)—petitioners did not here seek to avail themselves of the provisions of Section 1292(b).

Since the stay here was not a "injunction" and since petitioners have not brought themselves within Section 1292(b), the clearly interlocutory order of the District Court was not appealable and the decision of the Court of Appeals is unassailable.

CONCLUSION

The Court of Appeals was manifestly correct in dismissing the appeal. Its decision accords with the decisions of this Court and of other Courts of Appeals which have considered the questions. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
August 26, 1964.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Respondent International Longshoremen's and Warehousemen's Union.